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No. 97-1337

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the United States' "guarant[ee]" to the Chippewa Indians in an 1837 Treaty of the "privilege of hunting, fishing, and gathering the wild rice" within a territory that they had ceded in present-day Minnesota was extinguished by an 1850 Executive Order, which was never enforced to prohibit the Chippewa from fishing, hunting, and gathering in the ceded territory, which was superseded by Treaties negotiated in 1854 and 1855, and which has since been recognized by the United States as being of no effect.

2. Whether a provision of the 1855 Treaty to which one of the respondent Chippewa Bands, the Mille Lacs Band, was a party extinguished that Band's hunting, fishing, and gathering privilege within the territory ceded by the 1837 Treaty.

3. Whether the Chippewa's hunting, fishing, and gathering privilege under the 1837 Treaty was extinguished, *sub silentio*, by Minnesota's admission to the Union in 1858 on an equal footing with other States.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1-73) is reported at 124 F.3d 904.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1997. A petition for rehearing was denied on November 17, 1997. Pet. App. 7. The petition for a writ of certiorari was filed and docketed on February 17, 1998, the day after a federal holiday, and was granted on June 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns whether the United States ever effectively rescinded its "guarant[ee]" to the Chippewa Indians in an 1837 Treaty of the "privilege of hunting, fishing, and

gathering the wild rice" within an area of present-day Minnesota. It does not concern any right to enter onto private property to hunt, fish, or gather. The Chippewa claim no such right. They seek simply to be able to hunt, fish, and gather on lands that are open to the public for such purposes, subject only to tribal regulation and to such supplemental state regulation as may be "necessary in the interest of conservation," *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975), or public health and safety.

1. In 1837, several Chippewa Bands entered into a Treaty with the United States in which they agreed to cede a tract of land, totaling more than 13 million acres, in present-day Wisconsin and Minnesota. Treaty of July 29, 1837, 7 Stat. 536 (Pet. App. 484). Article 5 of the 1837 Treaty stipulated that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." 7 Stat. 537. The Chippewa entered into another Treaty with the United States in 1842 that ceded additional lands in present-day Wisconsin and Michigan and that reserved the Chippewa's right to hunt, fish, and gather on those lands as well. Treaty of Oct. 4, 1842, 7 Stat. 591.[1]

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[1] The Seventh Circuit held in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341 (1983), that the Chippewa retained their hunting, fishing, and gathering rights under the 1837 and 1842 Treaties on public lands within the Wisconsin portion of the territory ceded by those Treaties. This Court dismissed the State's appeal for want of jurisdiction and, treating the appeal as a petition for a writ of certiorari, denied the petition. *Besadny* v. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U.S. 805 (1983). Justices Brennan, Marshall, and Stevens would have affirmed. *Ibid.* See also *State* v. *Gurnoe*, 192 N.W.2d 892 (Wis. 1972) (upholding Chippewa's fishing rights under 1842 Treaty).

In 1850, President Taylor issued an Order that "revoked" the Chippewa's hunting, fishing, and gathering privileges under the 1837 and 1842 Treaties and "required [the Chippewa] to remove to their unceded lands." Pet. App. 565. The United States did not attempt to forcibly remove the Chippewa from the ceded lands. The government did, however, seek to induce those Chippewa who resided in Wisconsin and Michigan to relocate to the Minnesota Territory by moving the place at which they received their annuity payments to the unceded lands in the Minnesota Territory. The government did not enforce the portion of the 1850 Order relating to hunting, fishing, and gathering rights against any Chippewa Band. Pet. App. 30 n.24, 254, 256-257, 321.

The Chippewa did not remove from the ceded lands. In 1851, the Acting Secretary of the Interior suspended the removal effort. It was never resumed. The Chippewa continued to live within the ceded territory, and to hunt, fish, and gather wild rice there. The United States not only acquiesced in those activities but encouraged them, such as by providing the Chippewa with guns, ammunition, and traps. Pet. App. 30 n.24, 260-265, 320-321.

In 1854 and 1855, the United States negotiated new Treaties with the Chippewa, including the Bands residing in the territory ceded by the 1837 and 1842 Treaties, in order to acquire additional land in the Minnesota Territory. Treaty of Sept. 30, 1854, 10 Stat. 1109 (Pet. App. 490); Treaty of Feb. 22, 1855, 10 Stat. 1165 (Pet. App. 502). The United States agreed to set aside reservations in the 1837 and 1842 ceded territory as "permanent homes" for the Bands that resided there. The 1854 and 1855 Treaties did not confine the Chippewa to those reservations. And the Chippewa continued to hunt, fish, and gather on the previously ceded lands. Pet. App. 292, 299.

Of the Chippewa Bands residing in the 1837 ceded territory, only the Mille Lacs Band was a party to the 1855 Treaty. Article I of that Treaty provided that the signatory Bands would cede all of their right, title, and interest in some 10 million acres of land that lay within specified boundaries. Article I then stated that "the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they now have in, and to any other lands in the Territory of Minnesota or elsewhere." 10 Stat. 1166. The Treaty made no specific mention of hunting, fishing, or gathering rights. Nor were such rights discussed during the Treaty negotiations. Pet. App. 34-37, 284, 324.

Minnesota was admitted to the Union in 1858. Act of May 11, 1858, ch. 31, 11 Stat. 285 (Pet. App. 515). The Act did not purport to alter the treaty rights of Indians in the new State.

2. In 1990, the Mille Lacs Band and several of its members filed this action against the State of Minnesota and various state officials, seeking a declaratory judgment that they retain their rights under the 1837 Treaty to hunt, fish, and gather in the Minnesota portion of the ceded territory. They also sought an injunction against the State's interference with those rights. The United States intervened as a plaintiff; nine Minnesota counties and six landowners intervened as defendants. The court bifurcated the case into two phases: the first to determine whether, and to what extent, the Chippewa retain their rights under the 1837 Treaty, and the second to consider the regulation of any such rights.

The court concluded, after a trial on the phase one issues that involved 14 witnesses and more than 400 exhibits, that "the privilege guaranteed to the Chippewa of hunting, fishing, and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded to the United States by the treaty of 1837 continues to exist." Pet. App.

350. The court specifically held that those rights were not extinguished by the 1850 Order or the 1855 Treaty. *Id.* at 304-334.[2]

Several Wisconsin Bands of Chippewa were subsequently permitted to intervene as plaintiffs. The State of Minnesota, the counties, and the landowners asserted additional affirmative defenses, including that the Chippewa's usufructuary rights were extinguished by Minnesota's admission to the Union in 1858. The court granted the Bands' motion for summary judgment dismissing that defense, finding "nothing in the Minnesota Enabling Act that comes close to establishing a clear and plain intent by Congress to abrogate the 1837 privileges." Pet. App. 174-189.

In the second phase of the case, the State and the Bands stipulated to a Conservation Code and Management Plan to regulate hunting and fishing in the Minnesota portion of the 1837 ceded territory. The court resolved other issues that remained in dispute, concluding, *inter alia*, that it need not allocate the resources in that area between Indians and non-Indians, because there was no evidence of any real and substantial danger of depletion of natural resources. Pet. App. 128-139.

3. The State, together with the counties and landowners, appealed. The court of appeals affirmed on all issues raised by their appeals, including the three issues on which the State has sought this Court's review. Pet. App. 1-73.

First, the court concluded that the Chippewa's hunting, fishing, and gathering rights were not validly extinguished

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[2] The Fond du Lac Band and several of its members had filed a separate action in 1992, seeking a declaration that they retained their usufructuary rights under the 1837 and 1854 Treaties. The district court held that the Band continued to possess those rights. Pet. App. 419-481. The *Fond du Lac* suit was consolidated with the *Mille Lacs* suit for the second phase of the case.

by the 1850 Order. Pet. App. 21-31. The court reasoned that President Taylor had no authority to order the removal of the Chippewa from the ceded lands without their consent, because Congress had authorized the President to convey lands west of the Mississippi only to "such tribes or nations of Indians as *may choose* to exchange the lands where they now reside, and remove there." Act of May 28, 1830, ch. 148, § 1, 4 Stat. 412 (emphasis added). Accordingly, because "Congress required consent for removal, and the Bands did not consent, then President Taylor had no authority for his 1850 Executive Order of removal." Pet. App. 27. The court further determined that the portion of the 1850 Order directing the Chippewa to remove was not severable from the portion revoking their usufructuary rights, finding "no evidence that revocation of usufructuary rights would have been made independently of the removal mandate." *Id.* at 29-30. The court therefore held that "the entire 1850 Executive Order is invalid." *Id.* at 31.[3]

Second, the court held that the provision of the 1855 Treaty in which the signatory Bands agreed to relinquish "all right, title and interest * * * in, and to any other lands" could not properly be construed as extinguishing the Mille Lacs Band's privilege to hunt, fish, and gather within the territory ceded by the 1837 Treaty. Pet. App. 34-39. The court noted that hunting, fishing, and gathering rights were not specifically mentioned in the 1855 Treaty or in the negotiations that produced it. *Id.* at 37. And the court found ample support in the record for the district court's factual findings that neither the Band nor the United States had intended the 1855 Treaty to extinguish any such rights. *Ibid.* The court concluded that a contrary result was not

[3] The court of appeals did not address the district court's alternative grounds for finding that the Chippewa's usufructuary rights survived the 1850 Order. Pet. App. 31 n.25.

required by *Oregon Department of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985), which held that a Tribe had relinquished its right to fish or hunt on certain reservation lands when it ceded all "claim, right, title and interest" in those lands. The court explained that the rights in *Klamath* were "*exclusive* and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation," whereas the rights in this case are "*non-exclusive* and *off-reservation* rights." Pet. App. 39.

Third, the court held that the Chippewa's privilege to hunt, fish, and gather in the 1837 ceded territory was not extinguished *sub silentio* by the admission of Minnesota to statehood. Pet. App. 52-59. The court reasoned that Congress must clearly express its intent to abrogate Indian treaty rights. But the court could find no such expression of intent to abrogate the Chippewa's usufructuary privilege under the 1837 Treaty in the Act of Congress admitting Minnesota to the Union. *Id.* at 59. The court noted that an Indian Tribe's retention of its treaty rights to hunt or fish on off-reservation lands "does not offend the State's sovereignty," relying on *United States* v. *Winans*, 198 U.S. 371 (1905), and *Tulee* v. *Washington*, 315 U.S. 681 (1942). Pet. App. 58. The court deemed *Ward* v. *Race Horse*, 163 U.S. 504 (1896), which held that the particular Indian hunting right at issue there did not survive statehood, to be distinguishable. The court explained that, whereas the hunting right in *Race Horse* was "temporary" because it could be exercised only so long as the lands at issue remained unoccupied and owned by the United States, the hunting, fishing, and gathering rights in this case are of a "continuing" nature and are not tied to ownership of lands. Pet. App. 55 & n.42.

SUMMARY OF ARGUMENT

The United States has never effectively rescinded its "guarant[ee]" to the Chippewa in the 1837 Treaty of "the right to fish, to hunt, and to gather the wild rice" within the territory ceded by that Treaty. The State contends that the guarantee was extinguished by any of three instruments: President Taylor's 1850 Order purporting to require the Chippewa to remove from the ceded territory and to revoke their usufructuary privileges; the 1855 Treaty in which certain Chippewa Bands, including the respondent Mille Lacs Band, relinquished "all right, title, and interest * * * in, and to any other lands"; and the 1858 Act of Congress admitting Minnesota to the Union. Only the 1850 Order specifically addressed the privilege at issue. But the 1850 Order was quickly abandoned by the United States without its provision revoking the Chippewa's usufructuary privilege ever having been enforced. It has no continuing validity. The text and history of the 1855 Treaty and the 1858 Act do not reflect any intent by the United States to extinguish the Chippewa's privilege to hunt, fish, and gather within the 1837 ceded territory. Much less do they provide the "clear evidence" required by this Court that "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *South Dakota* v. *Bourland*, 508 U.S. 679, 693 (1993).

I. Even during the period immediately after the 1850 Order was issued, the United States did not enforce its provision revoking the Chippewa's usufructuary privilege. The Chippewa continued to fish, hunt, and gather, just as they had previously, throughout the 1837 ceded territory. Although the United States did seek to remove some Chippewa Bands from Wisconsin and Michigan to the Minnesota Territory on the authority of the 1850 Order, the

United States formally suspended that removal effort in 1851 and never resumed it. The United States entered into new treaties with the Chippewa in 1854 and 1855 that superseded the 1850 Order. Those treaties provided the Chippewa with permanent homes within the 1837 ceded territory—the very territory from which they were ordered to remove in 1850—on the understanding that they could continue to hunt, fish, and gather throughout that territory.

II. As for the 1855 Treaty, there is no evidence that the Chippewa or the United States understood the provision on which the State relies, which ceded the Chippewa's "right, title, and interest * * * in, and to any other lands," as encompassing the Mille Lacs Band's usufructuary privilege under the 1837 Treaty. A privilege to hunt, fish, or gather on lands open to the public for those purposes was not commonly understood at that time to be a right or an interest "in, and to * * * lands." Other contemporaneous treaties simultaneously ceded "all [the Indians'] right, title, and interest in and to" their lands and preserved the Indians' hunting, fishing, and gathering rights on those same lands, thus demonstrating that both the government and tribal negotiators understood such usufructuary rights to be distinct from rights or interests in land. And, when the United States actually intended to extinguish a Tribe's hunting or fishing rights, the United States did so in express terms. At a minimum, the Mille Lacs Band's usufructuary privilege under the 1837 Treaty is not so unambiguously a "right, title, or interest * * * in, and to * * * lands" as to require the 1855 Treaty to be construed to the Indians' disadvantage and contrary to their understanding.

III. The Act admitting Minnesota to the Union in 1858 contains no mention of Indian treaty rights. This Court has recognized on numerous occasions, stretching over nearly a century, that the admission of a State to the Union is not irreconcilable with Indians' retention of their treaty rights to

hunt and fish on lands and waters within the State outside their reservation. The Court's earlier decision in *Ward* v. *Race Horse*, 163 U.S. 504 (1896), which held that the particular hunting right in that case did not survive statehood, does not support the same result here. As the Court explained, at the time that the Senate ratified the treaty in *Race Horse*, the Senate understood the hunting right provided by the treaty to be "temporary and precarious," because the right was limited, by its terms, to the period in which the ceded lands remained unoccupied and owned by the United States. No such limitation was imposed on the fishing, hunting, and gathering rights here. The text of the 1837 Treaty "guarantied" those rights to the Chippewa, a term that suggests that the United States and the Indians would have understood those rights to be certain and secure, not "precarious," in their nature, until the President definitively terminated them. And, because the rights are capable of continuing indefinitely, so long as that remains the "pleasure of the President," they would not have been viewed as inherently "temporary." The inclusion of similar provisions in other contemporaneous Indian treaties, which preserved Indian's rights to hunt, fish, and gather on ceded lands that already were or soon would be within a State, confirms that the Senate would not have viewed such rights as terminating automatically with statehood.

ARGUMENT

I. PRESIDENT TAYLOR'S 1850 ORDER WAS NEVER ENFORCED TO PREVENT THE CHIPPEWA FROM EXERCISING THEIR USUFRUCTUARY PRIVILEGE UNDER THE 1837 TREATY AND WAS ABANDONED ENTIRELY WITHIN A FEW YEARS OF ITS ISSUANCE

The State contends that the Chippewa's privilege to hunt, fish, and gather on the lands ceded to the United States by the 1837 Treaty was extinguished by President Taylor's 1850 Order "revok[ing]" the privilege and "requir[ing] [the Chippewa] to remove to their unceded lands." Order of Feb. 6, 1850 (Pet. App. 565). The court of appeals rejected the State's argument on the ground that the 1850 Order was invalid. This Court need not, however, decide the Order's validity *ab initio*, because the Order's purported revocation of the Chippewa's usufructuary rights never became effective. The United States did not enforce the usufructuary rights provision of the Order against any Chippewa. And the entire Order was superseded by the Treaties of 1854 and 1855, which allowed the Chippewa to remain permanently on reservations within the 1837 ceded territory, and contemplated that they would continue to hunt, fish, and gather throughout that territory.[4]

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[4] The court of appeals, while recognizing that the 1850 Order was "never implemented," was soon "suspen[ded]," and was ultimately "replaced" by a new policy (Pet. App. 30 n.24), did not reach the question whether the Order had thereby been repealed by implication (*id.* at 31 n.25). The district court, however, held, as an alternative ground for its decision, that the Order was repealed by implication (*id.* at 319-321).

A. The United States Never Sought To Enforce The 1850 Order's Revocation Of Usufructuary Rights

The 1850 Order contained two provisions. The first "revoked" the Chippewa's privileges under the 1837 and 1842 Treaties to continue to hunt, fish, and gather wild rice within the territory that they had ceded to the United States in present-day Michigan, Wisconsin, and Minnesota. The second provision "required" the Chippewa to "remove to their unceded lands," which were located in the Minnesota Territory north and west of the area ceded in 1837.

The United States did not enforce the first provision of the 1850 Order to prevent the Chippewa from hunting, fishing, and gathering wild rice on the ceded lands. Indeed, it does not appear that the Chippewa were even informed of that provision. Pet. App. 257. Nor does it appear that any federal Indian agent in the Minnesota Territory was directed to take any action to enforce the provision. *Id.* at 254. The Chippewa continued to hunt, fish, and gather after 1850 as they had previously. *Id.* at 263. As the district court found, "[t]he revocation of hunting, fishing, and gathering rights was never enforced against any of the Chippewa," even in the years immediately after the issuance of the 1850 Order. *Id.* at 321; see *State* v. *Gurnoe*, 192 N.W.2d 892, 895 (Wis. 1972) (Chippewa continued to fish in ceded territory after 1850 Order).

The United States did attempt to enforce the removal provision of the 1850 Order, although only against certain Chippewa Bands and only for a short time. Pet. App. 267, 321. The removal efforts were focused on the Lake Superior Bands, which resided on the ceded lands within the States of Wisconsin and Michigan. Those Bands were told by government officials in 1850 to relocate to the Minnesota Territory.[5]

[5] The district court found that the Minnesota politicians who urged President Taylor to adopt the 1850 Order were motivated by the perceived "economic benefits generated by having a large number of Indians residing in their territory." Pet. App. 251. The politicians believed that if the Chippewa relocated to the Minnesota Territory, "Minnesota traders would be more likely to benefit from the annuity payments made to the Indians, Minnesota businesses would be able to compete for the lucrative business of supplying and transporting annuity goods, and Minnesota would receive money from Indian agencies for their operations and for schools, farms, and blacksmith establishments." *Id.* at 251-252. It is consistent with such a motive that the government did not seek to enforce the 1850 Order, in any respect, against those Chippewa, such as the Mille Lacs Band, who were already residing well within the Minnesota Territory.

The Bands refused to do so. They claimed to have been promised during the 1842 Treaty negotiations that they would not have to leave the ceded lands for many years. *Id.* at 255-256.[6]

B. The United States Suspended Enforcement Of The Removal Provision Of The 1850 Order By 1851

In order to induce the Lake Superior Chippewa to remove to the Minnesota Territory, government officials changed the place at which the Chippewa's annuities were paid.[7] The annuities had previously been paid at La Pointe, within the Chippewa's ceded lands in Wisconsin. In 1850, the officials announced that the annuities would thereafter be paid at Sandy Lake on the unceded lands in the Minnesota Territory. They expected that the Chippewa would choose to remain permanently near Sandy Lake, rather than to travel back and forth between Sandy Lake and the ceded

[6] The Chippewa's position was corroborated by non-Indians who were present during the 1842 negotiations. Pet. App. 255-256.

[7] Indians were entitled to annuities, paid in cash, goods, or both, under various treaties ceding lands to the United States. Generally, to receive the annuities, the Indians had to travel to a site designated by the Office of Indian Affairs. Pet. App. 247 n.12.

lands in Wisconsin and Michigan to collect the annuities. Pet. App. 256-258.

The government's first annuity payment at Sandy Lake in late 1850 proved to be a disaster. The Chippewa had been directed by John Watrous, a federal Indian agent, to be at Sandy Lake on October 25 to receive their payments. By November 10, nearly 4,000 Chippewa had gathered at Sandy Lake. But Agent Watrous did not arrive until November 24, and the annuities were not distributed until December 2. No adequate provisions had been made for housing and feeding the Chippewa for such a prolonged period. Measles and dysentery broke out among the Chippewa. Between 150 and 170 Indians died at Sandy Lake, and 230 more died during the trip back to their ceded lands. Pet. App. 256-258; see *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, 347 (7th Cir.), cert. denied, 464 U.S. 805 (1983).

That experience intensified opposition to the 1850 Order, not only among the Chippewa, but also among non-Indian residents of the area. Pet. App. 258. On June 3, 1851, Luke Lea, the recently appointed Commissioner of Indian Affairs, recommended to the acting Secretary of the Interior that the removal of various Lake Superior Chippewa Bands be discontinued. Commissioner Lea, citing "communications from sources of the highest consideration" expressing opposition to the removal of those Bands, argued that the removal "is not required by the interests of the citizens or Government of the United States and would in its consequences in all probability be disastrous to the Indians." Pet. App. 259; J.A. 214-215. On August 23, 1851, after Agent Watrous reported that the Chippewa could not be removed from the ceded lands without the use of federal troops, the Office of Indian Affairs sent a second communication to the acting Secretary of the Interior, seeking authority "to

instruct Agent Watrous to suspend the removal of these Indians." Pet. App. 260; J.A. 223-224.

On August 25, 1851, the acting Secretary of the Interior authorized Commissioner Lea "to instruct Agent Watrous to suspend the removal of the Chippeway Indians until the final determination of the President upon the subject of your letter of the 3rd June 1851," *i.e.*, the recommendation that the removal be discontinued. Pet. App. 260; J.A. 225. On the same day, Commissioner Lea sent a telegram to Agent Watrous, directing him to "[s]uspend action with reference to the removal of Lake Superior Chippewas" pending "further orders." Pet. App. 260-261; J.A. 225; *Lac Courte Oreilles*, 700 F.2d at 347; cf. *Wolsey* v. *Chapman*, 101 U.S. 755, 769 (1879) (noting that "the acts of heads of departments, within the scope of their powers, are in law the acts of the President"). No further order was ever issued directing that the removal be resumed. The State's own expert historian testified at trial that "[f]ederal efforts to remove the Lake Superior Chippewa to the Mississippi River effectively ended in the summer of 1851." Pet. App. 264; J.A. 986, 1356.[8]

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[8] There is some historical evidence that the United States expressly promised the Chippewa that the 1850 Order would be revoked. In June 1852, a Chippewa delegation, led by Chief Buffalo, traveled to Washington, D.C., to urge President Fillmore to revoke the 1850 Order. Benjamin Armstrong, a trader who accompanied the delegation, later wrote that the effort was successful. According to Armstrong's account, President Fillmore agreed to revoke the 1850 Order and to cause the annuity payments to be resumed at La Pointe. Pet. App. 263; *Lac Courte Oreilles*, 700 F.2d at 347-348. The district court, however, observed that Armstrong's account "may not be very reliable" (Pet. App. 263), and thus did not rely on that account in analyzing whether the 1850 Order was abandoned.

C. The United States Ceased Even Indirect Efforts To Effect The Removal Of The Chippewa By 1853

The government continued for a time to pay the Chippewa's annuities only in the unceded territory, in an attempt to induce the Indians to remove there voluntarily. In 1853, however, the government resumed paying the annuities at La Pointe and elsewhere in the ceded territory. Pet. App. 264. In a December 1853 letter to Commissioner of Indian Affairs George Manypenny, Henry Gilbert, the federal Indian agent who made the annuity payments, reported that he had assured the Chippewa that future payments "would be made at points easy of access to them all," such as La Pointe. Pet. App. 265-266; J.A. 243. Agent Gilbert explained that the earlier "change from La Pointe [to Sandy Lake] was only an incident of the order for removal" (Pet. App. 266; J.A. 243), thus reflecting the understanding that a change back to La Pointe was appropriate because the 1850 Order was no longer to be given effect.

The government's annuity payments to the Chippewa during that period included gunpowder, lead, and shot. Pet. App. 265. In addition, the Chippewa requested, and Agent Gilbert agreed, that future annuity payments include guns as well. *Ibid.* The government thus not only acquiesced in, but encouraged, the Chippewa's exercise of their hunting rights on the ceded lands.

D. The United States Entered Into New Treaties With The Chippewa In 1854 And 1855 That Superseded The 1850 Order

In his 1854 Annual Report to Congress, Commissioner Manypenny confirmed that the United States had abandoned the policy of removal of the Chippewa reflected in the 1850 Order. He observed that "a few small bands of the Chippewas of Lake Superior, who still occupy their former locations on lands ceded by the treaties of 1837 and 1842" in

Wisconsin and Michigan, "are very unwilling to relinquish their present residences, as are all the other bands of the same Indians." Pet. App. 267-268; J.A. 279. He added that "it may be necessary to permit them all to remain, in order to acquire a cession of the large tract of country they still own east of the Mississippi, which, on account of its great mineral resources, it is an object of material importance to obtain." Pet. App. 267; J.A. 279. Over the next two years, the United States entered into treaties with the Chippewa that did, indeed, "permit them all to remain" within the territory ceded in 1837 and 1842.

In August 1854, Commissioner Manypenny directed Agent Gilbert to negotiate with the Chippewa for the purchase of "all the country they now own or claim in the territory of Minnesota, the State of Wisconsin or elsewhere," except a quantity of land to be set aside as reservations. Pet. App. 273; J.A. 264. The Chippewa Bands that participated in the 1854 Treaty negotiations received reservations within the territory ceded by the 1837 and 1842 Treaties. Pet. App. 274. The 1854 Treaty contained a specific assurance that "the Indians shall not be required to remove from the homes hereby set apart for them." *Ibid.*; J.A. 495.[9]

In January 1855, Commissioner Manypenny summoned the chiefs of various Chippewa Bands that had not participated in the 1854 negotiations, including the Mille Lacs

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[9] Agent Gilbert explained to Commissioner Manypenny that the Chippewa insisted that those provisions be included in any treaty:

> [T]he points most strenuously insisted upon by [the Chippewa] were first the privilege of remaining in the country where they reside and next the appropriation of land for their future homes. Without yielding these points, it was idle for us to talk about a treaty. We therefore agreed to the selection of land for them in territory heretofore ceded.

Pet. App. 274-275.

Band, to Washington, D.C., to negotiate a new treaty for the sale of any remaining land in the Minnesota Territory in which they claimed an interest. Pet. App. 276-277. The resulting 1855 Treaty granted to the Mille Lacs Band, as its "permanent hom[e]," a reservation within the territory ceded by the 1837 Treaty. *Id.* at 283, 503-504.

As the district court recognized, the 1854 and 1855 Treaties are "completely contrary to the 1850 order," because those Treaties establish permanent homes for the Chippewa in the very territory that they were directed to vacate by the 1850 Order. Pet. App. 321; accord *Gurnoe*, 192 N.W.2d at 899-900. The 1854 and 1855 Treaties do not, in so many words, confirm the Chippewa's rights to hunt, fish, and gather within the 1837 and 1842 ceded territory. But the continued existence of those rights is implicit in those Treaties. The 1854 Treaty, for example, provides that the Chippewa would receive, as part of their compensation for the cession of additional lands, "two hundred guns, one hundred rifles, five hundred beaver-traps, [and] three hundred dollars' worth of ammunition." Pet. App. 494. Similarly, while the 1855 Treaty does not itself spell out the precise "goods" and "other useful items" that were to be paid to the Mille Lacs Band (*id.* at 507), the Treaty Journal records that Commissioner Manypenny promised that those goods and items would include "guns, traps, etc." *Id.* at 289; J.A. 318, 326. Clearly, the Chippewa were expected to use those firearms, traps, and ammunition within the 1837 and 1842 ceded territory, where they would continue to reside by virtue of the 1854 and 1855 Treaties. See *Lac Courte Oreilles*, 700 F.2d at 364-365 ("The Government's provision of guns and ammunition to the Indians pursuant to the 1854 treaty suggests that the United States did not envision the Indians abandoning their traditional pursuits.").

Even the State does not appear to dispute that the Chippewa retain the rights to hunt, fish, and gather on the

reservations set aside for them by the 1854 and 1855 Treaties, cf. *United States* v. *Dion*, 476 U.S. 744, 738 (1986) (noting the "general rule" that "Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them"), and consequently that the 1854 and 1855 Treaties entirely superseded the 1850 Order with respect to those portions of the 1837 and 1842 ceded territory included in the reservations. But the reservations encompassed only a small part of the Chippewa's traditional hunting, fishing, and gathering grounds. The Chippewa could not have survived if they were suddenly restricted to hunting, fishing, and gathering only within the reservations. Pet. App. 325. And there is no evidence that the United States intended such a cruel result. To the contrary, the Chippewa recalled that Agent Gilbert had assured them during the 1854 negotiations that the reservations "were not to confine us all together to live upon them—that we should have the privilege of going out of it whenever we had a mind for hunting purposes." *Id* at. 274.

Article 11 of the 1854 Treaty, which states that "such of [the Indians] as reside in the territory hereby ceded, shall have the right to hunt and fish therein" (Pet. App. 495), confirms that the United States expected that the Chippewa would continue to hunt, fish, and gather throughout the area in which they resided, on ceded lands as well as reservation lands. Article 11 specifically refers, of course, only to territory ceded by the 1854 Treaty. But the 1837 and 1842 Treaties had already preserved the Chippewa's usufructuary rights within the territory ceded under those Treaties.

Finally, both the 1854 Treaty and the 1855 Treaty contained provisions prohibiting the sale of liquor not only on the reservations but throughout the ceded territory. Pet. App. 494-495, 512. Those provisions reflect the United States' understanding that the Chippewa would not be confined to their reservations. It was instead expected that they would venture outside the reservations—for example,

to hunt or to fish—and should not be exposed to liquor when they did so. As this Court observed in construing the liquor provision of the 1855 Treaty, "[i]t was evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, would be at liberty to roam and to hunt throughout the entire country, as before," and that the liquor provision would "guard them from all temptation to use intoxicating liquors" anywhere within that country. *Johnson* v. *Gearlds*, 234 U.S. 422, 438 (1914).

E. The United States' Recognition Of The Chippewa's Usufructuary Rights In 1855 During The Rum River Dam Dispute Confirms That The 1850 Order Had Been Abandoned

In 1849, non-Indian lumbermen built a dam on the Rum River within the territory ceded by the 1837 Treaty. The Mille Lacs Chippewa protested that the dam interfered with their wild rice harvest. The dispute reached a head in the spring of 1855, when violence broke out between the lumbermen and the Chippewa. A detachment of federal troops was dispatched to maintain the peace. Pet. App. 269. Significantly, in communications between themselves and with the Chippewa during that period, federal officials acknowledged that the Chippewa retained the rights under the 1837 Treaty to hunt, fish, and gather wild rice on the ceded lands, although not the right to prevent the construction of dams that interfered with those activities.

In February 1855, for example, Willis Gorman, the Governor of the Minnesota Territory and ex officio superintendent of Indian affairs for the Territory, wrote to Commissioner of Indian Affairs Manypenny, explaining that "[t]he lands occupied by the timbermen have been surveyed and sold by the United States and the Indians have no other treaty interests *except hunting and fishing.*" Pet. App. 270; J.A. 295-296 (emphasis added). There is no indication that

Commissioner Manypenny disagreed with Governor Gorman's understanding that the Chippewa retained their usufructuary rights in the 1837 ceded territory. Otherwise, Governor Gorman doubtless would not have continued to maintain, as he did in a June 1855 letter to Mille Lacs Chief Little Hill, that the dam, even if located on land included within the Mille Lacs Reservation under the 1855 Treaty, "was put there before you had any rights there *except to fish and hunt.*" Pet. App. 271 (emphasis added). If the 1850 Order was effective in 1855, and thus had deprived the Chippewa of the rights to hunt, fish, and gather on the ceded lands, Commissioner Manypenny and Governor Gorman surely would have said so.[10]

F. The United States Has Continued To Recognize The Chippewa's Rights To Hunt, Fish, And Gather Wild Rice On The Lands Ceded By The 1837 Treaty

The Chippewa continued to hunt, fish, and gather wild rice throughout the 1837 ceded territory into this century. Pet. App. 299, 325; J.A. 829-837; *Lac Courte Oreilles*, 700 F.2d at 364. And, although non-Indian settlers and the State of Minnesota sometimes challenged the Chippewa's right to do so, those challenges were not based on the 1850 Order. Pet. App. 300.

The 1850 Order appears to have been forgotten by 1894, when the Court observed in *United States* v. *Thomas*, 151 U.S. 577, 582 (1894), that "no executive order has ever been made for the[] removal" of the Chippewa from the 1842 ceded territory. The United States represented to the Court in *Thomas* that, while the 1842 Treaty allowed the Chippewa to remain in the ceded territory only "until required to re-

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[10] The dispute was resolved later in 1855 when the lumbermen agreed to compensate the Chippewa for their losses of wild rice. Pet. App. 271.

move by the President," "[t]he President did not require them to remove and no Executive order looking to their removal has ever been made." J.A. 505-506. The 1850 Order could not have had any continuing vitality by the time of *Thomas* if neither the Executive Branch nor the Court was aware that it ever existed.

Again, in 1925, when asked whether the Wisconsin Chippewa retained their rights under the 1837 and 1842 Treaties to hunt and fish on the ceded lands outside their reservations, the Office of Indian Affairs responded that "[n]o record has been found of the abrogation of the treaty provisions" that guaranteed those rights and, "[a]pparently, therefore, there is merit in the claims of the Indians." Pet. App. 327; J.A. 541. The absence of any such record in the Office of Indian Affairs further indicates that the 1850 Order had long since been abandoned.

In 1938, after apparently going unnoticed by the United States for some 80 years, the 1850 Order began to be cited in correspondence by federal officials, including President Roosevelt, as having revoked the Chippewa's hunting, fishing, and gathering privileges under the 1837 and 1842 Treaties. See Pet. App. 300, 575-578; J.A. 549-555, 1823-1836. As the district court noted, however, that correspondence does not reflect that the authors "considered all of the background relevant to treaty interpretation," including that the United States had never enforced the usufructuary rights provision of the 1850 Order and had abandoned the entire Order soon after its issuance. Pet. App. 300.

By 1947, the United States, after having considered some of the history surrounding the 1850 Order, took the position in the *Mole Lake Band* litigation in the Court of Claims that the 1850 Order "was never carried out" and thus was of no

continuing effect. J.A. 557-558; accord J.A. at 560.[11] The government explained that "[t]he Treaty of 1854, which was made four years after the executive order of the President, in effect cancelled the President's Executive order." J.A. at 564. The government added that, "[i]n its administrative interpretations as to the effect of the Executive Order of February 6, 1850, the United States never considered that the Indian rights were terminated thereby." J.A. at 565.

Finally, in the *Lac Courte Oreilles* litigation concerning the Chippewa's hunting, fishing, and gathering privilege within the Wisconsin portion of the 1837 ceded territory, the United States again maintained that the 1850 Order had not effectively terminated that privilege. The government explained to this Court that the 1850 Order "was never enforced," "was quickly abandoned as the policy of the United States," and was "superseded by" the 1854 Treaty. U.S. Motion to Dismiss in Part and Affirm in Part at 12-13, *Besadny* v. *Lac Courte Oreilles Band*, No. 83-6 (J.A. 575-576).[12]

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[11] The government's statement in *Mole Lake Band* was directed at the question whether the Chippewa had been removed, pursuant to the 1850 Order, from the lands ceded in the Treaties of 1837 and 1842. The government explained to the court that the Chippewa remained, after the 1850 Order, "in possession of the land covered by the treaties of 1837 and 1842, and which they had occupied from time immemorial." J.A. 560.

[12] Congress has since appropriated funds to assist the Great Lakes Indian Fish and Wildlife Commission, an entity formed by the Chippewa, in its management of the Chippewa's use of natural resources in the 1837 and 1842 ceded territory. See, *e.g.*, U.S. Dep't of Interior, *Bureau of Indian Affairs, Budget Justifications FY 1998, reprinted in Department of the Interior and Related Agencies Appropriations for 1998: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 105th Cong., 1st Sess. 631, 747 (1997). The Fish and Wildlife Service has since 1986 promulgated regulations under the Migratory Bird Treaty Act that recognize the Chippewa's hunting rights in that territory. See, *e.g.*, 63 Fed. Reg. 46,558, 46,562 (Sept. 1, 1998) (final rules for 1998-1999 season); 63 Fed. Reg. 43,854, 43,857 (Aug. 14, 1998) (proposed rules).

G. The State Has Offered No Authority For Enforcing The 1850 Order's Usufructuary Rights Provision, For The First Time, A Century And A Half After Its Issuance

The State's position here is quite remarkable: that a presidential order revoking treaty rights that was never enforced by the Executive Branch, and that was quickly superseded by treaties made by the Executive Branch and ratified by the Senate, should be enforced for the first time by the Judicial Branch a century and a half after its issuance. The State has cited no comparable case in which a presidential order has been resurrected in such circumstances by the courts. Nor are we aware of any such case.

This Court's decision in *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366 (1856), is instructive in its refusal to enforce a removal provision of an Indian treaty that the political branches of government had declined to enforce. In that case, the Seneca Indians had entered into a treaty with the United States in which they agreed to remove from two reservations in New York to a new reservation in Kansas within a specified period of time. The treaty also provided for the sale of the Indians' lands in New York to private parties, including one Joseph Fellows. The Indians did not remove from New York within the time specified by the treaty, and the United States did not force them to do so. Fellows then attempted to take forcible possession of the New York lands. The Court held that Fellows "derived no power, under the treaty, to dispossess by force these Indians, or right of entry, so as to sustain an ejectment in a court of law." *Id.* at 372. The Court explained that "the treaty was to be carried into execution by the authority or power of the Government, which was a party to it," *id.* at 371, and consequently that "a forcible removal must be made, if made at all, under the direction of the United

States," *id.* at 372. Similarly, here, only the United States, and specifically the President, has the authority under the 1837 Treaty to deprive the Chippewa of their usufructuary rights. But the United States has consistently chosen not to carry out that authority. Just as the mere existence of the unenforced removal requirement of the Seneca treaty did not give the courts the authority to enforce that provision at the behest of Fellows, the mere existence of the unenforced usufructuary rights revocation in the 1850 Order does not give the courts the authority to enforce that provision at the behest of the State. See *United States* v. *Kagama*, 118 U.S. 375, 384 (1886) (noting that in *Fellows* "the State could not enforce th[e] removal" of the Seneca, because "the duty and the power to do so was in the United States").

The State has invoked the well-settled rule of statutory construction that "repeals by implication are not favored." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). But that rule accepts that repeals by implication may, and indeed should, be found where the intent to do so is apparent from the surrounding circumstances. Moreover, the fundamental point here is that the 1850 Order, including its provision concerning hunting, fishing, and gathering rights, was essentially an executory directive from the President to the Indians that was never carried out. It is clear from the facts summarized above that the United States intended to, and did, abandon the policy embodied in the 1850 Order of removing the Chippewa from the ceded lands and terminating their privileges to hunt, fish, and gather wild rice there. See *Gurnoe*, 192 N.W.2d at 407 (concluding that 1850 Order "has no effect" on Chippewa's right to fish within 1842 ceded territory, given "the fundamental change in policy marked by the 1854 treaty, the rights granted in the treaty, and the fact that the order of 1850 did not result in an actual revocation of fishing rights").

The State further suggests (Br. 27) that, whether or not the United States abandoned the removal portion of the 1850 Order, there is "no evidence" that the United States abandoned the portion of the Order relating to the Chippewa's usufructuary rights. The State's position is untenable for several reasons. First, since the United States never enforced the usufructuary rights provision and, to the contrary, continued to facilitate the Chippewa's exercise of those rights, the United States doubtless perceived no need to formally suspend or terminate the provision. Second, as both the court of appeals and the district court recognized (Pet. App. 9-31, 310-312), the usufructuary rights provision was included in the 1850 Order for only one purpose, *i.e.*, to encourage the Chippewa's compliance with the removal provision. Accordingly, once the United States abandoned its objective of removing the Chippewa from the ceded territory, the United States necessarily abandoned all of the 1850 Order, the usufructuary rights provision as well as the removal provision. It would have served no purpose of the United States to allow the Chippewa to remain in the ceded territory but to prevent them from engaging in the activities essential to their survival. Third, the 1854 and 1855 Treaties superseded the entire 1850 Order by giving the Chippewa permanent homes within the 1837 and 1842 ceded territory, in the expectation that they would continue to hunt, fish, and gather throughout that territory. Fourth, Governor Gorman's statements during the Rum River Dam dispute, both to the Commissioner of Indian Affairs and to the Chippewa themselves, reflect the government's understanding in 1855 that the Chippewa retained their hunting, fishing, and gathering privilege under the 1837 Treaty. Finally, the United States has since maintained (except for a brief period in the 1930s and early 1940s) that the 1850 Order either did not exist or was "cancelled," a position that does not allow for the continued vitality of any portion of the Order. And

the United States has acted for at least the past half century in accordance with the view that the Chippewa retain their usufructuary privilege under the 1837 Treaty.

II. THE 1855 TREATY DID NOT EXTINGUISH THE MILLE LACS BAND'S USUFRUCTUARY PRIVILEGE UNDER THE 1837 TREATY

The State further contends (Br. 40-48) that the 1855 Treaty abrogated the usufructuary privilege of the Mille Lacs Band, although not of the other respondent Bands, under the 1837 Treaty. The 1855 Treaty does not, however, expressly refer to the 1837 Treaty or to hunting, fishing, or gathering rights. The sole provision of the 1855 Treaty on which the State relies, which cedes the signatory Bands' "right, title, and interest * * * in, and to any other lands," does not unambiguously, if at all, encompass a privilege to hunt, fish, and gather on certain lands, lakes, and rivers that are open to the public. It therefore cannot be construed to the Indians' disadvantage and contrary to their understanding.

A. The Plain Language Of The 1855 Treaty Cannot Properly Be Construed As Abrogating The Mille Lacs Band's Usufructuary Privilege Under The 1837 Treaty

In the 1855 Treaty, various Chippewa Bands, including the respondent Mille Lacs Band,[13] agreed to cede to the United States all of their remaining lands, a small portion of which were to be set aside "for the permanent homes of said Indians," and the United States agreed to pay the Bands annuities of cash and goods as compensation for the lands.

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[13] The 1855 Treaty was negotiated with the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa. The Mille Lacs Band is one of the Mississippi Bands.

Treaty of Feb. 22, 1855, 10 Stat. 1165 (Pet. App. 502). Article I of the 1855 Treaty states that the signatory Bands "hereby cede, sell and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries." *Ibid.* Article I then proceeds to describe those boundaries, which define an area north and west of the area ceded by the 1837 Treaty. *id.* at 502-503. Article I then concludes with a sentence stating: "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." *Id.* at 503. It is that sentence alone that, according to the State, abrogates the Mille Lacs Band's usufructuary privilege in the 1837 ceded territory.

1. The State's argument rests on the proposition that a privilege to fish, hunt, or gather on lands that are open to the public for those purposes is a "right * * * [or] interest * * * in, and to * * * lands" within the terms of Article I. But that proposition is dubious at best. The rights secured to the Chippewa under the 1837 Treaty are more naturally viewed as rights to engage in the specified activities within the specified area, not as rights or interests in the lands within that area.

According to the State, the Chippewa's hunting, fishing, and gathering privilege is an easement or a profit, both of which are considered to be interests in land. See Restatement of Property § 450 (1944). But the State's argument disregards the particular nature of the rights at issue as they existed at the time of the 1855 Treaty. In 1855, as in 1837, all unfenced, unimproved lands within the ceded territory were open to the public generally for hunting, fishing, and gathering, without any restriction under federal or territorial law. See Pet. App. 223; J.A. 775; *McKee* v. *Gratz*, 260 U.S. 127,

137 (1922) (noting the "common understanding" that people may "wander, shoot and fish at will" on "unenclosed and uncultivated land"). As a practical matter, therefore, the 1837 Treaty did not provide the Chippewa with any greater rights, in 1837 or in 1855, than were possessed by non-Indian residents of the ceded territory. We are aware of no authority, and the State has offered none, holding that a privilege to hunt, fish, or gather on open lands, in common with the public generally, would have been viewed in 1855 as an easement, a profit, or any other sort of right or interest in land. See Pet. App. 332; J.A. 774-775 (testimony of legal historian Thomas Lund that the treaty drafters would not have considered such a privilege to be a right or an interest in land).

The understanding that such usufructuary rights are not rights or interests in land is reflected in several Nineteenth Century treaties and agreements between the United States and Indian Tribes. In 1891, for example, the United States negotiated an agreement with the Colville Indians that provided, in separate articles, that the Indians would cede to the United States "all their right, title, claim and interest," without qualification, in a large tract of land, and that the Indians' "right to hunt and fish in common with all other persons" on that land "shall not be taken away or in anywise abridged." *Antoine* v. *Washington*, 420 U.S. 194, 196 (1975); *id.* at 208 (Douglas, J., concurring). Nine separate treaties negotiated between the United States and Tribes of the Pacific Northwest in 1855 (and thus contemporaneously with the Treaty at issue here) similarly provided, in one article, that the Tribes would "cede, relinquish, and convey to the United States all their right, title, and interest in and to" certain territory that they occupied and, in a subsequent article, that certain rights would be "secured" to the Tribes, including "the privilege of hunting and gathering roots and berries on open and unclaimed lands" within the ceded

territory. *E.g.*, Treaty of Jan. 22, 1855, arts. I, III, 12 Stat. 927-928.[14] The text and structure of those instruments demonstrate that both the government and tribal negotiators understood hunting, fishing, and gathering rights to be distinct from "right[s]" or "interest[s]" in land. It was not incompatible for Indians to retain a right or privilege to hunt, fish, or gather on lands as to which they had ceded, without reservation, "all their right, title, and interest."

Indeed, when the United States and a Tribe did agree to a termination of hunting or fishing rights, they did so by express reference to such rights. For example, in another 1855 Chippewa treaty negotiated by Commissioner Manypenny, the signatory Band specifically "surrender[ed] to the United States the right of fishing at the falls of St. Mary's"

[14] See also Treaty of Jan. 26, 1855, arts. I, III, 12 Stat. 933-934; Treaty of Jan. 31, 1855, arts. I, III, 12 Stat. 939-940; Treaty of June 9, 1855, arts. I, III, 12 Stat. 945-946; Treaty of June 9, 1855, arts. I, III, 12 Stat. 951, 953; Treaty of June 11, 1855, arts. I, III, 12 Stat. 957-958; Treaty of June 25, 1855, arts. I, III, 12 Stat. 963-964; Treaty of July 1, 1855 and Jan. 25, 1856, arts. I, III, 12 Stat. 971-972; Treaty of July 16, 1855, arts. I, III, 12 Stat. 975-976. Those treaties also secured for the Tribes "[t]he right of taking fish at usual and accustomed grounds and stations * * * in common with all citizens of the Territory." Treaty of Jan. 22, 1855, art. V, 12 Stat. 928. As this Court has recognized, such a provision reserves for a Tribe not only a right to fish on lands and waters accessible to the general public, as did the 1837 Treaty in this case, but also a right to enter even private lands to reach the "usual and accustomed" fishing grounds. *United States* v. *Winans*, 198 U.S. 371, 381 (1905). Such rights would be more in the nature of an easement or a profit than are the rights at issue in this case. See *ibid.*; *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556 (1916) (assuming that Indians' right to enter onto private lands to fish and hunt would be an easement or a profit).

secured under an earlier treaty. Treaty of Aug. 2, 1855, art. I, 11 Stat. 631.[15]

2. At a minimum, even if a "right * * * [or] interest * * * in, and to * * * lands" could permissibly be construed to include a right to fish, hunt, or gather on lands open to the public, "[t]hat is surely not * * * the phrase's unambiguous meaning." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 268 (1992). It is "a principle deeply rooted in this Court's Indian jurisprudence" that statutes and treaties affecting Indian rights "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* at 269 (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985)); accord, *e.g.*, *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-432 (1943); *Winters* v. *United States*, 207 U.S. 564, 576-577 (1908). In *Yakima Nation*, for example, the Court concluded, in accordance with that principle, that a statute authorizing "taxation of * * * land" should not be construed as authorizing "'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land." 502 U.S. at 269. So, too, here, a treaty relinquishing Indians' "right, title, or interest * * * in, and to * * * lands" should not be construed as also relinquishing Indians' right to engage in particular activities, such as hunting, fishing, and gathering, on the open lands and waters within a particular territory.

3. A second, related principle of construction is also applicable here: the principle that a treaty negotiated be-

[15] See also, *e.g.*, Treaty of Nov. 15, 1865, art. I, 14 Stat. 751 (providing that the Middle Oregon Tribes' "right to take fish, erect houses, hunt game, gather roots and berries, and pasture animals upon lands without the reservation set apart by the treaty aforesaid—[is] hereby relinquished"); Treaty of Oct. 13, 1846, art. IV, 9 Stat. 878 (government agrees to pay Winnebago Indians $40,000 "for release of hunting privileges, on the lands adjacent to their present home").

tween the United States and an Indian Tribe is to be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington* v. *Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-676 (1979) (*Fishing Vessel*); accord, *e.g.*, *United States* v. *Winans*, 198 U.S. 371, 380-381 (1905). That principle reflects the recognition that the United States possessed "superior negotiating skills and superior knowledge of the language in which the treaty is recorded" and thus had "a responsibility to avoid taking advantage of the other side." *Fishing Vessel*, 443 U.S. at 675-676; see *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 642 (1970); *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899). Such was the case with respect to the 1855 Treaty. Commissioner of Indian Affairs Manypenny, the negotiator for the United States, communicated with the Chippewa negotiators through interpreters. Pet. App. 278; J.A. 297, 308, 311, 314, 321 (noting presence of interpreter during negotiations). He observed in the course of the negotiations that "one great impediment to a good understanding between the government and the Indians arose from the fact that the latter cannot read or understand the contracts which they make." Pet. App. 278; J.A. 305; see J.A. 349 (Commissioner Manypenny notes Chippewa negotiator Hole-in-the-Day's "want of education" and inability to read the Treaty).

The district court found, and the court of appeals agreed, that the Chippewa did not understand the provision of the 1855 Treaty relinquishing their "right, title, and interest * * * in, and to any other lands" as encompassing the privilege to hunt, fish, and gather on the lands ceded by the 1837 Treaty. Pet. App. 36-38, 324. The quoted phrase had no literal equivalent in the Chippewa language. It would most likely have been translated into Chippewa as simply a relinquishment of "the lands" at issue, which would not have

conveyed to the Indians that they were relinquishing the privilege of hunting, fishing, and gathering on previously ceded lands. *Id.* at 284, 324-325; J.A. 856-862 (report of linguist John D. Nichols).

B. The History Surrounding The 1855 Treaty Confirms That The Parties Did Not Intend To Revoke The Mille Lacs Band's Usufructuary Privilege Under The 1837 Treaty

The historical record reflects that neither the United States nor the Chippewa intended that the 1855 Treaty revoke the hunting, fishing, and gathering privilege guaranteed by the 1837 Treaty. Pet. App. 37-38, 279-290.

The Authorizing Legislation. The 1855 Treaty, like the 1854 Treaty, was negotiated under the authority of the Act of December 19, 1854, Ch. 7, 10 Stat. 598, which authorized negotiations with the Chippewa "for the extinguishment of their title to all the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin." Pet. App. 532. The Act made no mention of also seeking the Chippewa's relinquishment of hunting, fishing, and gathering rights under earlier treaties with respect to lands that they no longer owned or claimed. To the contrary, Senator Sebastian, the Chairman of the Committee on Indian Affairs, explained during the Senate debate that the contemplated treaties would "reserve[] to them [*i.e.*, the Chippewa] those rights which are secured by former treaties." Cong. Globe, 33d Cong., 1st Sess. 1403-1404 (1854).

The Negotiations. Commissioner Manypenny summoned several chiefs of the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa to Washington, D.C., in early 1855 for the stated purpose of "enter[ing] into additional articles of convention with them respecting their claim to lands in Minnesota." J.A. 288. The treaty journal recounts that Commissioner Manypenny explained to the Chippewa

chiefs at the outset of the negotiations that "[h]is object in sending for them was to buy from them a portion of their lands lying in the Mississippi [River] country." J.A. 304. Chippewa negotiators Hole-in-the-Day and Flatmouth also expressed their understanding that the purpose of the negotiations was to buy their land. See J.A. 304 (Hole-in-the-Day: "Your words strike us in this way. They are very short. 'I want to buy your land.'"); J.A. 309 (Flatmouth: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land."), In response to Flatmouth's statement, Commissioner Manypenny confirmed that his interest was in buying land, noting that Flatmouth "appears to understand the object of the interview." *Ibid.* He added that Flatmouth's "people had more land than they wanted or could use, and stood in need of money," whereas "I have more money than I need, but want more land." *Ibid.* The treaty journal records no discussion of any relinquishment of the Chippewa's hunting, fishing, and gathering privileges on lands that they had previously ceded to the United States.

The Treaty Ratification. On February 27, 1855, President Pierce submitted the Treaty to the Senate for ratification, together with a memorandum by Commissioner Manypenny describing the Treaty. J.A. 290-294. That report, like the Treaty itself, contains no express mention of any hunting, fishing, or gathering rights. In the report, Commissioner Manypenny noted that the quantity of land ceded by the Treaty, "according to the boundaries defined in the first article," was estimated at between 11 million and 14 million acres. J.A. 291-292. He went on to explain that, in addition to the land within those boundaries, "those Indians (and especially the Pillager and Lake Winnibigoshish bands) have some right or interest in a large extent of other lands in common with other Indians in Minnesota, and which right or interest * * * is also ceded to the United States." J.A. 292.

The "other lands" referred to by Commissioner Manypenny—which presumably were the "other lands" referred to in the final sentence of Article I—do not appear to be the lands ceded by the 1837 Treaty. The Pillager and Lake Winnibigoshish Bands did not live in the territory ceded by the 1837 Treaty. It is thus unlikely that Commissioner Manypenny would have described the usufructuary rights reserved in the 1837 Treaty as belonging "especially" to those Bands. And, whereas the rights with which Commissioner Manypenny was concerned were possessed by the signatory Bands "in common with other Indians in Minnesota," the usufructuary privilege under the 1837 Treaty was possessed by the Mille Lacs Band in common with other Indians primarily in Wisconsin. Pet. App. 287.

As Commissioner Manypenny's report suggests and as the district court found, the final sentence of Article I had a different purpose than to extinguish the Mille Lacs Band's usufructuary rights: "to ensure that the Chippewa did not have any remaining claims to lands located north and west of the territory ceded in the first sentence of Article I." Pet. App. 286. The Pillagers, among others, had asserted claims to lands in that area, but had refused to specify the precise nature and extent of their claims. *Id.* at 287-288; see J.A. 317-318 (Pillager negotiator Flatmouth declines to "state precisely what our bands claim as a right"). The district court found that Commissioner Manypenny "drafted the broad language of [the last sentence of Article I] "because he was not sure about the nature and scope of the claims made by the Chippewa to the remaining unceded lands in Minnesota." Pet. App. 288.

The 1854 Treaty. Of the various Chippewa Bands that resided within the territory ceded by the 1837 Treaty, only the Mille Lacs Band was a party to the 1855 Treaty. J.A. 731-734. Most of the other Bands had participated in the

1854 Treaty negotiations. Accordingly, if the United States had actually intended to abrogate the Chippewa's hunting, fishing, and gathering rights in the 1837 ceded territory, the United States would doubtless have sought to include a provision to that effect in the 1854 Treaty. But it did not. Nor does the 1854 Treaty include a provision like that in the 1855 Treaty generally relinquishing the Bands' "right, title, and interest * * * in, and to any other lands." Indeed, the 1854 Treaty expressly secures the signatory Bands' usufructuary rights on lands that were newly ceded by the Bands in that Treaty. No reason has been suggested why the United States would have sought to extinguish the usufructuary rights of the Mille Lacs Band alone.

Subsequent History. The Mille Lacs Band, like the other Chippewa Bands, continued after 1855 to hunt, fish, and gather in the 1837 ceded territory. Pet. App. 292, 325. The United States did not interfere with that activity based on any authority supposedly provided by the 1855 Treaty. It is noteworthy that the United States did not suggest during the Rum River Dam dispute, which occurred simultaneously with the negotiation and ratification of the 1855 Treaty, that the Mille Lacs Band's privilege of hunting, fishing, and gathering was affected by that Treaty. For example, Governor Gorman wrote a letter to a Mille Lacs chief in June 1855, after the 1855 Treaty had been ratified, continuing to express the view that the Band possessed hunting and fishing rights throughout the 1837 ceded territory. Pet. App. 271. Governor Gorman, as the superintendent of Indian affairs in the Minnesota Territory, was certainly aware of the provisions of the 1855 Treaty.[16]

[16] In the 1920s, long after the ratification of the 1855 Treaty, the United States took the position, in at least one letter by a Commissioner of Indian Affairs, that the 1855 Treaty "modified" the Chippewa's usufructuary rights under the 1837 Treaty. J.A. 543. But that letter does not reflect any analysis of the proper construction of the final sentence of Article I or of the intent of the parties regarding the Chippewa's usufructuary rights.

C. This Court's Decision In *Klamath Indian Tribe* Does Not Control The Construction Of The 1855 Treaty

The State contends (Br. 42-44) that *Oregon Department of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985), governs the construction of Article I of the 1855 Treaty. As the court of appeals recognized, however, this case does not involve a "situation[] * * * analogous" to *Klamath*. Pet. App. 39.

In *Klamath*, the United States and the Tribe had entered into an 1864 Treaty, whereby the Tribe conveyed to the United States all of its remaining lands, a portion of which were to be set aside by the United States as the Tribe's reservation. It was later determined that the reservation actually set aside for the Tribe excluded certain lands that should have been included under the terms of the 1864 Treaty. The United States agreed in 1901 to compensate the Tribe for those lands, and the Tribe agreed to "cede, surrender, grant, and convey to the United States all [its] claim, right, title and interest in and to" those lands. The Tribe later contended that it had not thereby relinquished its usufructuary right under the 1864 Treaty with respect to those lands.

The Court recognized that the 1864 Treaty had secured to the Tribe certain hunting, fishing, and gathering rights. But the Court concluded that those rights were intended to exist only "within the limits of the reservation." 473 U.S. at 766. The Court reached that conclusion based on the Treaty's provisions stating that the Tribe's fishing rights extended only to "the streams and lakes included in said reservation," the Tribe's gathering rights applied only "within [the

reservation's] limits," and the Tribe's rights to fish, hunt, and gather were "exclusive," which would not "be possible on lands open to non-Indians." *Id.* at 767. Accordingly, "because the right to hunt and fish reserved in the 1864 Treaty was an exclusive right to be exercised within the reservation," the Court concluded that "that right could not * * * survive off the reservation" on lands that the Tribe had sold. *Id.* at 769-770. The exclusive, on-reservation nature of the usufructuary rights secured by the 1864 Treaty, in turn, informed the Court's construction of the "all claim, right, title and interest" language of the 1901 Agreement and undergirded its holding that the Tribe retained no usufructuary rights on the ceded lands. See *id.* at 766 (noting that the "[m]ore important[]" consideration in the construction of the 1901 Agreement was that "the language of the 1864 Treaty plainly describes rights intended to be exercised within the limits of the reservation").

The Chippewa's usufructuary rights under the 1837 Treaty, in contrast to the Klamath Indians' rights under the 1864 Treaty, are not exclusive or restricted to a reservation. The Chippewa ceded title to certain of their lands in the 1837 Treaty, while expressly preserving their right to hunt, fish, and gather on those lands. They had no reservation at that time, within the 1837 ceded territory or elsewhere, to which those usufructuary rights might have been confined. Nor were the Chippewa's usufructuary rights under the 1837 Treaty ever considered to be exclusive. It is implicit in the 1837 Treaty that the Chippewa could not exclude others from the ceded lands, which the Chippewa had sold to the United States on the understanding that they would be opened to non-Indians for purposes such as lumbering. Accordingly, because the 1837 Treaty does not "describ[e] rights intended to be exercised [only] within the limits of the reservation," the Court's principal reason for concluding that

the usufructuary rights were extinguished in *Klamath* is inapplicable here.[17]

III. THE CHIPPEWA'S USUFRUCTUARY PRIVILEGE UNDER THE 1837 TREATY WAS NOT EXTINGUISHED BY THE ADMISSION OF MINNESOTA INTO THE UNION

The State alternatively contends (Br. 29-40) that Congress abrogated the Chippewa's usufructuary privilege under the 1837 Treaty by admitting Minnesota into the Union "on an equal footing with the original States." Act of May 11, 1858, ch. 31, 11 Stat. 285 (Pet. App. 515). The State's position finds no support in the text and history of the Minnesota Admission Act, which contain no mention of Indian treaty rights, much less of any congressional intent to abrogate them. Nor is the State's position consistent with this Court's many decisions recognizing that statehood,

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[17] Other considerations reinforce the conclusion that a different result is required here than in *Klamath*. The Court emphasized in *Klamath* that "[t]he Tribe was represented by counsel" in negotiating the 1901 Agreement and that "the tribal negotiating committee members spoke and understood English." 473 U.S. at 772. The Chippewa were not represented by counsel during the 1855 negotiations, the Chippewa negotiators did not speak or understand English, and a representative of the Mille Lacs Band may not even have reached Washington, D.C., until the negotiations were completed. Pet. App. 277, 278. Moreover, while both parties in *Klamath* plainly understood the precise tract of land to which the Tribe was relinquishing "all claim, right, title and interest," the text and history of the 1855 Treaty offer no basis to conclude that any party understood the final sentence of Article I to have any application to the 1837 ceded territory. In contrast to *Klamath*, therefore, "[t]he historical record" offers no reason to suppose that Article I of the 1855 Treaty, if construed as the State suggests, "fairly describes the * * * understanding between the parties." 473 U.S. at 772.

without more, did not terminate Indians' treaty rights to hunt, fish, and gather on their ceded lands.

1. Any analysis of the State's position must begin with the rule, often recited by this Court, that "Congress' intention to abrogate Indian treaty rights be clear and plain." *Dion*, 476 U.S. at 738; accord *Fishing Vessel*, 443 U.S. at 690 ("[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of [Indian] treaty rights"); *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968) ("the intention to abrogate or modify [an Indian] treaty is not to be lightly imputed to the Congress"). In order to conclude that Indian treaty rights have been abrogated, the Court has required "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 738; accord *South Dakota* v. *Yankton Sioux Tribe*, 118 S. Ct. 789, 798 (1998).

There is no such evidence here. The State concedes (Br. 36) that the Minnesota Admission Act "is silent as to the Indians' 1837 Treaty privilege." The legislative history of that Act likewise contains no suggestion that any Indian treaty rights were to be extinguished by Minnesota's admission to the Union.

Nor is a State's admission to the Union on an equal footing with other States incompatible with an Indian Tribe's retention of its treaty rights to fish, hunt, and gather within the State on lands outside its reservation. This Court has recognized in a number of cases, stretching over nearly a century, that such Indian treaty rights may survive statehood. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 674-685; *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 397-399 (1968); *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198-199 (1919); *Winans*, 198 U.S. at 382-383; cf. *Antoine*, 420 U.S. at

201-204 (United States did not violate the sovereignty of an existing State by granting Indians the right to hunt and fish on ceded lands); *Menominee Tribe*, 391 U.S. at 411 (United States did not violate the sovereignty of an existing State by establishing a reservation where Indians could fish and hunt without state regulation). It was unnecessary in those cases for Congress to have said anything at the time of statehood to preserve the Indians' treaty rights.[18]

2. Even *Ward* v. *Race Horse*, 163 U.S. 504 (1896), the case principally relied on by the State, acknowledges not only that Congress has the power to secure off-reservation hunting rights to an Indian Tribe in a territory that has not yet become a State, but that "it would be also within the power of congress to continue them in the state, on its admission into the Union." *Id.* at 515. The Court further acknowledged that Congress need not expressly preserve such rights in the act admitting the State to the Union, so long as the rights "are of such a nature as to imply their perpetuity, and the consequent purpose of congress to continue them in the state." *Ibid.*[19] But the Court found that the particular right at issue there—"the right to hunt on the

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[18] The Court has also rejected equal footing challenges to the continued existence after statehood of other provisions of Indian treaties and agreements. See, *e.g.*, *Johnson*, 234 U.S. at 439-440 (provision of 1855 Treaty with Chippewa prohibiting sale of liquor on ceded lands); *Winters* v. *United States*, 207 U.S. at 577-578 (implied term of agreement acquiring Indian lands and creating reservation that Indians would retain rights to water from river on reservation); cf. *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188, 197 (1876) (rejecting equal footing challenge to provision of treaty, ratified after Minnesota's admission to statehood, that prohibited sale of liquor on ceded lands).

[19] Indeed, in the same Term as *Race Horse*, in an opinion by Justice White, who also authored *Race Horse*, the Court implicitly recognized that the Chippewa's treaty right to fish at the falls of Sault Ste. Marie continued to exist after Michigan was admitted to the Union. *Spalding* v. *Chandler*, 160 U.S. 394, 406-407 (1896).

unoccupied lands of the United States," *id.* at 514—was not intended to be continuing in nature, but to be "temporary and precarious." *Id.* at 515. As noted above, in the century since *Race Horse*, the Court has often recognized that the admission of a State to the Union was insufficient, in and of itself, to abrogate Indians' rights under other treaties to hunt or fish within the State. The Court has never again relied on the *Race Horse* analysis to hold that Indian treaty rights were extinguished by statehood.

In any event, whatever vitality *Race Horse* retains after *Winans* and its progeny, *Race Horse* does not support the conclusion that the Chippewa's usufructuary privilege under the 1837 Treaty was revoked by Minnesota's admission to the Union. The touchstone of the Court's analysis in *Race Horse* was the intent of the Congress (more precisely, in the case of treaties, the Senate) that adopted the provision securing the Indians' usufructuary rights. See 163 U.S. at 515 (considering whether the hunting right was "intended to be of a limited duration" when "created by congress"). Neither the text nor the history of the 1837 Treaty suggests that the Chippewa's hunting, fishing, and gathering privilege was intended to terminate automatically upon statehood.

The 1837 Treaty provides, in pertinent part, that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." Art. V, 7 Stat. 537. The Treaty thus precisely identified the circumstance in which the privilege would terminate: when the Chippewa's exercise of the privilege was no longer the "pleasure of the President." He alone was vested with the power and discretion to determine whether the privilege should end. There is no intimation that the President would be required to conclude that the privilege should terminate if and when a State was established in the ceded area. It was

the President's prerogative, after statehood as before, to allow the Chippewa to continue to hunt, fish, and gather.[20]

The use of the term "guarantied" is also significant. A right that is "guarantied" is one that is certain and secure, as opposed to "precarious," in its nature. The word "guaranty" or "guarantee" was commonly understood in the Nineteenth Century, as it is today, as meaning "[t]o warrant," "to make sure," or "[t]o undertake to secure to another, at all events, as claims, rights or possessions." Noah Webster, *American Dictionary of the English Language* (1828); see also IV James A.H. Murray, *A New English Dictionary* 477 (1901) (defining the verb "guarantee" as, *inter alia*, "to assure the existence or persistence of; to set on a secure basis"). Presumably, when the Framers used the term "guarantee" in

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[20] The State's reliance on the "during the pleasure of the President" language to suggest that the rights at issue were too "temporary and precarious" to survive statehood is undermined by *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906). In that case, the Court recognized that the provision of the 1842 Treaty securing the Chippewa's "right of hunting on the ceded territory, with the usual privileges of occupancy, until required to remove by the President," was not extinguished by Wisconsin's admission to the Union. The Court thus held that, although the Wisconsin Enabling Act had granted to the State the sixteenth section of each township for school purposes, the State had no right to interfere with the Chippewa's occupancy of any such sections that were within the boundaries of their reservations:

> That right of occupancy gave [the Chippewa] the enjoyment of the lands until they were required to surrender it by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated.

201 U.S. at 213-214 (quoting *Thomas*, 151 U.S. at 583); see also *Johnson*, 234 U.S. at 439 (Indian treaty provision prohibiting sale of liquor on ceded lands "until otherwise provided by Congress" survived Minnesota's admission to the Union).

Article IV, Section 4 of the Constitution, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," they did so to assure the people of the new nation that their entitlement to a republican form of state government was anything but "perishable" and "of limited duration." 163 U.S. at 515.[21] No language of "guarantee" appeared in the treaty in *Race Horse*.

The absence of any fixed termination point to the guarantee contained in the 1837 Treaty is noteworthy as well. It indicates that the guarantee to the Chippewa was capable of continuing in perpetuity and thus was not inherently "temporary." The treaty in *Race Horse*, by contrast, provided that the Indians' hunting right was to continue only for so long as their hunting grounds remained unoccupied and owned by the United States, conditions whose "disappearance" was already "clearly contemplated" at the time that the treaty was ratified. 163 U.S. at 509.

The United States acted in a different historical context in drafting and ratifying the 1837 Treaty, moreover, than in drafting and ratifying the treaty in *Race Horse* three decades later. As the Court noted, by the time that the treaty in *Race Horse* was negotiated in 1868, "the march of advancing civilization foreshadowed the fact that the wilderness"—*i.e.*, the Indians' off-reservation hunting ground—"was destined to be occupied and settled by the white man." 163 U.S. at 508-509. It was understood to be only a matter of time until "the necessities of civilization"

[21] See also Treaty of Alliance with France, Feb. 6, 1778, art. XI, 8 Stat. 10 (King of France "guarantees on his part to the United States, their liberty, sovereignty and independence, absolute and unlimited," and the United States "guarantee[s] * * * the present possessions of the crown of France in America, as well as those which it may acquire by the future treaty of peace").

would require that the Indians cease hunting in that area. *Id.* at 509. But that was not the understanding in 1837 with respect to the lands being ceded by the Chippewa. It was uncertain whether the ceded territory would ever experience the sort of "civilization" that would require the Chippewa's hunting, fishing, and gathering rights to be extinguished.[22]

For example, Commissioner of Indian Affairs Carey Harris stated, in his instructions to the negotiators of the 1837 Treaty, that the land to be acquired from the Chippewa "is valuable for its pine woods which cover it, but is unfit for cultivation." Pet. App. 228; J.A. 42. Henry Dodge, the Wisconsin territorial governor and principal U.S. negotiator, similarly stated during the negotiations that the land was "not suited to the culture of corn, and other Agricultural purposes," and that the government was seeking to acquire the land "for the advantage of its pine timber." Pet. App. 231; J.A. 47. And Governor Dodge assured the Chippewa that "[i]t will probably be many years, before your Great Father will want all these lands for the use of his white Children." Pet. App. 233; J.A. 78. As the district court concluded, the United States "expected the Chippewa to remain on the lands for many years," because "[t]he primary purpose of the treaty was to acquire land for timber, not settlement, and neither party to the treaty thought that continued exercise of usufructuary rights would interfere with lumbering." Pet. App. 314; see also J.A. 647. The relevant government officials did not contemplate in 1837 that the ceded territory would, at least for the foreseeable future,

[22] The Court noted in *Race Horse* that Congress had authorized the organization of the Wyoming Territory even before the ratification of the treaty at issue in that case. 163 U.S. at 504. But the organization of the Minnesota Territory was not authorized until 12 years *after* ratification of the 1837 Treaty. Act of Mar. 3, 1849, ch. 121, 9 Stat. 408.

attract the agriculturally based white settlement that would be incompatible with the Chippewa's exercise of their hunting, fishing, and gathering privilege.

The contemporaneous negotiation and ratification of treaties that secured Indians' usufructuary rights on ceded land within an existing State—or a territory that was imminently to become a State—confirm that the President and the Senate did not perceive the continued existence of such rights as being incompatible with a State's admission to the Union. The 1842 Treaty, for example, secured to the Chippewa "the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President." art. II, 7 Stat. 592. The territory ceded under the 1842 Treaty was located in Michigan, which had been admitted as a State in 1837, and Wisconsin, which was to be admitted in 1848.[23] Similarly, the 1854 Treaty, which preserved the Chippewa's usufructuary rights on newly ceded land within the Minnesota Territory, was ratified just three years before Minnesota became a State. It is unlikely that the President and the Senate would have perceived the usufructuary rights secured by that Treaty as being of such short duration, which would have been "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans*, 198 U.S. at 380; accord *Winters*, 207 U.S. at 577.

3. Finally, the State complains (Br. 37-38) that, if the Chippewa are recognized to retain their hunting, fishing, and gathering privilege under the 1837 Treaty, the State will be

[23] President Taylor apparently did not believe when he issued the 1850 Order that the Chippewa's usufructuary rights under the 1837 and 1842 Treaties were extinguished by Wisconsin's admission to the Union in 1848. The 1850 Order did not suggest any difference in the status of those rights in the State of Wisconsin as opposed to the Territory of Minnesota.

denied "the authority to unilaterally make management decisions regarding a wide variety of natural resource issues." The State raises the specter of the federal courts' micromanaging natural resource issues involving those lands. See Br. 38-39. It is no reason to deny the existence of federal rights, especially those of a politically unpopular minority, that the federal courts may have to enforce those rights, to the detriment of a State's ability "to unilaterally make management decisions" impinging on those rights. See, *e.g.*, *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*). This Court has recognized that the federal judiciary may sometimes have to play a continuing supervisory role in assuring the accommodation of Indians' usufructuary rights by a recalcitrant State. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 692-696.

In any event, the State's concerns about federal court intervention in natural resource management issues appear to be exaggerated, at least if recent experience is any guide. In the 15 years since the Seventh Circuit held that the Chippewa retained their hunting, fishing, and gathering rights in the 1837 and 1842 ceded territory in Wisconsin, the district court has been required to issue only a few decisions clarifying the scope of those rights. As that court has observed, the Chippewa, through the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), and the Wisconsin Department of Natural Resources have worked cooperatively to implement and manage those rights, obviating the need for extensive judicial involvement. See, *e.g.*, *Lac Courte Oreilles Band* v. *Wisconsin*, 707 F. Supp. 1034, 1050, 1052-1054 (W.D. Wis. 1989); see also Proposed Migratory Bird Hunting Regulations, 63 Fed. Reg. 43,854, 43,857 (Aug. 14, 1998) (noting cooperation between GLIFWC and States of Wisconsin and Michigan in developing hunting rules for 1837 and 1842 ceded territory).

The same sort of cooperation can be anticipated here. As the courts below noted, the Chippewa, the State, and the United States agreed upon a Conservation Code and Management Plan, which resolved most resource management issues relating to tribal hunting and fishing within the 1837 ceded territory in Minnesota. Pet. App. 73, 80, 88. The State has conceded that the Conservation Code and Management Plan is adequate to conserve natural resources and to protect public health and safety. Pet. App. 65.[24]

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[24] The respondent landowners, although not the State, argue that the federal courts are deprived of jurisdiction over "plaintiffs'" claims by the Indian Claims Commission Act, which provided that "no claim existing before [the date of approval of the Act] but not presented within [five years after that date] may thereafter be submitted to any court or administrative agency for consideration." Act of Aug. 13, 1946, ch. 959, § 12, 60 Stat. 1052. See Thompson, *et al.*, Br. 13. That argument is without merit. The Act applied, by its terms, only to specified categories of "claims *against the United States* on behalf of any Indian tribe, band, or other identifiable group of American Indians." § 2, 60 Stat. 1050 (emphasis added). The Act could thus have no application to claims by the United States, which is an intervening plaintiff in this case. See Pet. App. 18 ("The United States has fully participated in all proceedings on behalf of the Bands. As an intervenor, it has the right to continue the suit even without the presence of the Bands."). Nor could the Act have any application to claims by Indians against a State to prevent ongoing interference with their federal treaty rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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